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In the
Supreme Court of the United States

October Term, 1963

No. 547

GERALD L. RATIGAN, et al.,

Appellants,

vs.

HERBERT DAVIS, et al.,

Appellees.

On Appeal from the Supreme Court of the State of Nebraska

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM JUDGMENT

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ARGUMENT

The Allegations of the Petition

Appellees claim that there is no direct assault on the Nebraska statutes, Section 14-1317, R.R.S. Nebraska, 1943, except in the prayer of the petition. In *Standard Reliance Insurance Company v. Schoenthal*, 171 Neb. 490, 106 N. W. 2d 704, cited by the appellees, and immediately

before the quotation excerpted by the appellees, appears this statement by the Nebraska Court:

> "This court has held that a petition containing a prayer for general relief in addition to a prayer for specific relief as in the case before us, entitles the litigant to all the relief the proof shows that he is entitled to receive."

In this instance the plaintiffs-appellants' prayer to their petition is merely a summarization of the allegations of the petition. Certainly the allegations of the petition and the proof control. Here, however, the entire case of the appellants as shown by the petition is that Section 14-1317 is unconstitutional as applied to them.

We point out to the Court that in Paragraph V of appellants' petition in the District Court of Douglas County, Nebraska, the allegation is "That under the provisions of Section 14-1317, R. R. S. Nebraska 1943, the Board of Regents of the Municipal University of Omaha is required to certify and the said Board has certified a tax on all taxable property * * *," and in Paragraph VI of appellants' petition they state: "* * * *that all persons* resident taxpayers in the City of Omaha who happen also to be residents of either School District No. 66 of Douglas County, Nebraska, or School District No. 54 of Douglas County, Nebraska, *are being taxed under the aforesaid provisions of law* * * *." In Paragraph VII of appellants' petition, they allege: "That the levy against plaintiffs' tangible property as established by various defendants for the year 1962 *pursuant to the above and foregoing cited statutes* * * *." In Paragraph IX of the petition wherein the specific allegations of unconstitutionality are set forth, the appellants say: "The assessments of the

taxes *herein referred to* and the attempted collection of the said taxes against the property owned by the plaintiffs and against the property owned by all taxpayers similarly situated is absolutely void, illegal, invalid and unconstitutional for the following reasons and each of them * * *." (Emphasis supplied throughout.)

The prayer then sums all this up by praying that the court determine that "Section 14-1317, R. R. S. Nebraska 1943, is absolutely void, illegal and unenforceable and unconstitutional as applied to these plaintiffs and others similarly situated." No claim has ever been made in this action that the Statute is unconstitutional on its face, but merely that it is unconstitutional as applied to these appellants and others similarly situated, who are being taxed under the provisions of the statute without having a voice in the management and control of the institution which they are taxed to support.

This Court will not search for a Federal question where the Court below has passed upon a Federal question. *Charleston Federal Savings & Loan Association v. Alderson*, 324 U. S. 182, 185, 65 S. Ct. 624, 627. The Supreme Court of the State of Nebraska in its opinion below (p. 16 Jurisdictional Statement) said:

> "Plaintiffs assert that the fixing of the tax to be levied violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."

Later in the opinion (p. 19 Jurisdictional Statement), the Nebraska Court said:

> "We quite agree, as we have consistently held, that the authority which is required to establish districts, whether they be for election, taxation, or other

governmental purposes, must comply with the uniformity, equality, and due process provisions of the state *and federal* Constitutions. But we have no such problem here, except incidentally. Whether or not the tax levy here made is valid is dependent on entirely different considerations. The first consideration is, of course, that representation is not a condition precedent to the right to tax."

Finally, in its penultimate paragraph, the Supreme Court of the State of Nebraska said:

> "It may be that the Legislature has a function to perform in order to avoid other situations that may arise with reference to constitutional requirements, but under the facts presented in the instant case we find no constitutional provision, *federal* or state, having the effect of voiding the two-mill tax levy on the tangible property within the annexed areas." (Emphasis supplied.)

The Nebraska Court having passed upon a federal question herein involved, there is no necessity for this Court to search for such a question.

The specious claim of the appellees that appellants are represented.

The appellees claim that appellants are represented by being entitled to vote for the County Treasurer and for the City Council, neither of whom have anything whatsoever to do with a discretionary function, and both of whom perform merely ministerial functions under the Act.

Under Section 14-1317, R. R. S. Nebraska 1943, appended to both the Jurisdictional Statement and to Appellees' Motion, the Board of Regents has the discretion to set the tax up to the two-mill maximum levy and to cer-

tify the same to the City Council. Under Section 14-514, R. R. S. Nebraska 1943 (appended hereto as Appendix A), the City Council is given the ministerial function of certifying to the County Clerk the levy certified to it by the Regents. The exact wording of the statute insofar as here material is:

> "In addition to the provisions of subsections (1) and (2) of this section, the city council shall certify to the county clerk in like manner any other levy which may be required by law to be certified by such city council; * * *."

Section 14-514 was last re-enacted by the Nebraska Legislature in 1955. In its 1947 session the Nebraska Legislature passed Section 49-802, R. R. S. Nebraska 1943, which insofar as material herein, provides:

> "Unless such construction would be inconsistent with the manifest intent of the legislature, rules for construction of the statutes of Nebraska hereinafter enacted shall be as follows: (1) When the word 'may' appears, permissive or discretionary action is presumed. When the word 'shall' appears, mandatory or ministerial action is presumed."

Thus, the Omaha City Council, by whom the appellants herein are claimed to be represented in the handling of the levy of this tax, have no discretionary authority whatsoever to determine the amount of the levy or change the amount of the tax or affect it in any way whatsoever, once it is initially certified by the Board of Regents as meeting the tests set forth in Section 14-1317.

Likewise, Section 14-1318, R. R. S. Nebraska, 1943 (App. B, Jurisdictional Statement) confers no discretion upon the treasurer, Appellee Howell. He merely does as directed by the Board of Regents.

The decision in *Thomas v. Gay*, 169 U. S. 264, 18 S. Ct. 340, 42 L. Ed. 740, merely determines that non-residents may be taxed even though they do not have a vote. It does not determine that a tax is valid when it is levied upon a duly qualified resident elector who has been disenfranchised. To the extent that appellees would extend the doctrine announced in *Thomas v. Gay* to conflict with *Gomillion v. Lightfoot*, *Baker v. Carr* and *Gray v. Sanders*, it is apparent that the latter three cases should control in the light of present conditions.

CONCLUSION

In *Baker v. Carr*, 369 U. S. 186, at p. 198, 82 S. Ct. 691, at p. 699, this Court said:

> "Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial."

Appellants herein offer to this Court a most appropriate remedy for total disenfranchisement of any segment of the population. What can more quickly correct a situation of total disenfranchisement than turning off the flow of the funds which enables the officials to maintain themselves in power and to continue the disenfranchisement?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin M. Wall, one of the attorneys for appellants herein and a member of the Bar of the Supreme Court of the United States, do hereby certify that on November 2, 1963, I served copies of the foregoing Brief in Opposition to Appellees' Motion upon the appellees by depositing the same in a United States mailbox with first class postage prepaid, addressed to Seymour Smith and W. Ross King, counsel of record for the appellees other than the appellee Howell, at 720 Keeline Building and 620 First National Bank Building, Omaha, Nebraska, respectively, and to Francis Pane, counsel of record for the appellee Howell, at the County Courthouse of Douglas County, Omaha, Nebraska.

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APPENDIX "A"

14-514. Taxation; annual certification for levy; limits; special purposes; additional levies authorized. (1) The city council shall annually certify to the county clerk of the county in which the city is located, by resolution, the number of mills on the dollar upon the assessed value of all the taxable property in such city, except intangible property, not to exceed fourteen and four-tenths, which the city desires to be levied as taxation for all municipal purposes for the ensuing year; *Provided*, in any such city located in a county containing a duly constituted and functioning health district, the number of mills to be so certified shall not exceed in any one year fourteen and three-tenths. In addition thereto, the council shall certify the number of mills necessary to pay the interest on the bonded indebtedness of the city.

(2) In addition to the number of mills set forth in subsection (1) of this section, the council shall also and further certify not less than four additional mills and such number of mills as may be necessary to pay bond issues maturing within the year or bond issues maturing in the near future, the object of this requirement being to create a fund to accomplish a partial retirement of the bonded obligations of the city in such a manner as to avoid unusual and heavy levies during particular years when large maturities occur.

(3) The proceeds derived from the respective levies provided for in subsections (1), (2), and (4) of this section shall be devoted exclusively and entirely to the purposes for which the levy is made. The certification, provided for under subsections (1), (2), and (4) of this sec-

tion, shall be made before the county board of equalization shall have made its tax levy for each respective year.

(4) In addition to the provisions of subsections (1) and (2) of this section, the city council shall certify to the county clerk in like manner any other levy which may be required by law to be certified by such city council; *Provided,* that a further appropriation not to exceed one-fourth mill on the dollar upon the assessed value of all the taxable property, in such city, except intangible property, may also be levied for the purpose of establishing a recreation fund to be used for the purchase, establishment, management, equipment, and maintenance of playgrounds and recreation centers, including the construction of necessary buildings therefor. Such recreation fund shall be disbursed under the direction and supervision of the local governing body of said city in conjunction with the local governing body of any other governmental subdivision wholly or partially within its corporate limits when a plan has been submitted and approved by the electors, as hereinafter provided. If the school district, situated wholly or partially within such city, submits a plan and makes a levy for a similar purpose, said city shall not submit a plan or proposal for such a levy as long as said plan is in operation. No levy shall be made for such recreation fund purposes unless the proposition to make such levy and the plan to dispose of such fund be sanctioned by sixty per cent or more of the legal voters of the city either by petition signed by them or by sixty per cent or more of the votes cast on the proposal submitted on ballot at a general municipal election.